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SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 839

PATRICIA R. SMITH, - - - - - Petitioner,

vs.

See *Louisville Trust Co., etc. v. Smith*, 192 F. Supp. 396 (First Appeal dismissed, 295 F. 2d 107); 330 F. 2d 483; Opinion overruling Petition for Rehearing, Appendix "D," pp. 2576a-2579a, not reported.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased, - - - - - Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for Writ of Certiorari to United States Court of Appeals, Sixth Circuit.

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SUPREME COURT OF THE UNITED STATES

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No. 839

PATRICIA R. SMITH, - - - - *Petitioner,*

v.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, Joint Administrators With the Will Annexed of the Estate of John A. O'Brien, Deceased, - - - *Respondents.*

RESPONDENTS' BRIEF

In Opposition to Petition for Writ of Certiorari to United States Court of Appeals, Sixth Circuit.[1]

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

COUNTER-STATEMENT OF THE CASE.

Petitioner's petition for *certiorari* so totally fails "to present with accuracy, brevity, and clearness" that "concise statement of the case" essential to a ready understanding of the questions presented, as required

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[1]The Petition's Appendix A (statutory provisions, etc.) will be cited A. "A", p. ——: its Appendix B (Vol. I Transcript of Record) will be cited A. "B", p. ——: its Appendix C (Vol. II Transcript of Record) will be cited A. "C", p. ——: and its Appendix D (Vol. III Transcript of Record) will be cited A. "D", p. ——.

by this Court's Rules[2] that Respondents must briefly restate the essential facts.

1. *Nature of Suit.* This is Respondents' *statutory* suit under KRS 396.140, to recover from Petitioner for an overpayment (or overdistribution) to her, as a distributee of the estate of her former husband, John A. O'Brien, who died January 1, 1934 (A. "B", pp. 16a-45a, at 42a-43a).[3]

It is not, in any sense, an estate "settlement suit" or a suit to settle a decedent's estate, which Petitioner repeatedly asserts it to be (Petition, pp. 12, *et seq.*).

2. *O'Brien Family controversies; Petitioner's Compromise of them.* Immediately after Mr. O'Brien's death, Petitioner—ably assisted by competent attorneys, accountants and business advisors (A. "B", pp. 61a-67a)— had many controversies with Mr. O'Brien's family concerning his interest in the E. J. O'Brien & Co. family partnership and his $200,000.00 life insurance and large security holdings (A. "B", pp. 58a-61a).

She finally concluded them by a Compromise Settlement (dated Nov. 4-15, 1935, A. "B", pp. 68a-71a), which in due course was carried out, under which she (*a*) sold Mr. O'Brien's partnership interest for $380,000.00, (*b*) became undisputed beneficiary of and collected his $200,000.00 insurance, and (*c*) the O'Brien Family recognized her as the sole distributee of his whole estate including his large security hold-

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[2]Supreme Court Rule 23-1 (e) and 4.

[3]On September 30, 1944, Mr. O'Brien's widow, the Petitioner, married Walter B. Smith, her attorney herein (A. "B", p. 16a).

ings and other intangibles, all aggregating $707,532.57 (A. "B", pp. 73a-75a).

3. *Petitioner's Rescission Suit.* On March 10, 1937, Petitioner (then Mrs. O'Brien), in repudiation of her Compromise Settlement, sued the entire O'Brien Family and the Respondents, to rescind her compromise, alleging their fraud, etc. (A. "B", pp. 77a-78a; A. "C", pp. 1411a-1439a).

After over seven years of litigation, including a 15-day oral trial (2,000 pages of evidence), she *lost* her Rescission Suit in the lower court (A. "C", pp. 1491a-1545a), and on appeal (*O'Brien* v. *O'Brien,* 294 Ky. 793; cert. den. 321 U. S. 767, reh. den. 322 U. S. 769), the Kentucky Court of Appeals holding that her Compromise Settlement

> "was a *fair and reasonable* settlement and contract of purchase and sale" (294 Ky. at 820).[4]

4. *Respondents' Final Settlement of Mr. O'Brien's Estate, in Jefferson County Court.* On June 21, 1950, Respondents filed in Jefferson County Court their accounts for a Final Settlement of Mr. O'Brien's estate (A. "B", Complaint's Exhibit No. 1, pp. 46a-93a).

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[4]Meanwhile, on February 18, 1937, Respondents had sued in the Jefferson *Circuit* Court (a Kentucky court of general jurisdiction) to settle Mr. O'Brien's Estate, which on Petitioner's motion remained in abeyance to enable her to conclude her Rescission Suit litigation; but upon its conclusion and upon Petitioner's insistence that Respondents should settle the estate in Jefferson *County* Court(Kentucky's probate court), the Kentucky Court of Appeals upheld her insistence and directed that the settlement be made in such County Court (A. "B", pp. 76a-77a; *Smith* v. *Louisville Trust Co.,* 308 Ky. 189, and *Louisville Trust Co.* v. *Smith,* 313 Ky. 15).

For nearly two years Petitioner contested, objected to, and sought to prevent, the Respondents' Final Settlement, by numerous proceedings in the County Court, including her repeated objections, injunction proceedings against the County Judge (*Smith* v. *Shamburger, Judge,* 314 Ky. 850), her unsuccessful attempt to remove the Final Settlement proceeding to Federal Court, etc.[5]

Ultimately, and despite all her contesting of and objections to Respondents' Final Settlement, the County Court, by its September 8, 1950, Order held that Respondents' County Court proceeding

> "is a *final settlement* of their accounts as Co-Administrators" (A. "B", p. 997a);

and by its March 5, 1952, Judgment and May 1, 1952, Amended Judgment (A. "B", pp. 27a-35a; also summarized in District Court Opinion, 192 F. Sup. at 403-405), the County Court (1) **adjudged** that

> "The Estate of John A. O'Brien, deceased, be, and the same hereby is, *finally* settled",

and (2) **awarded** the Respondents and their attorneys compensation for their estate services aggregating $73,756.98 credited by $30,788.86 estate assets held for payment thereof.

Petitioner never appealed to Jefferson Circuit Court from such County Court Judgment and Amended Judgment, within the 60-day period allowed

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[5]Her 19 separate proceedings in her contest of the settlement are summarized by the Court of Appeals (330 F. 2d 483, at pp. 488-489; A. "D", pp. 2369a-2381a, at pp. 2378a-2380a).

by Ky. Civ. Code § 729; KRS 23.030 (2), or at all, and they became final and no longer appealable.

5. *This "over-distribution" Suit.* While the probate court (County Court) thus concluded and determined the *rights* of all parties and adjudged and awarded the personal representatives administration compensation, etc., it could not enforce its award (where there is insufficient estate assets for its payment) by the remedy of *execution*. The personal representatives' *enforcement remedy* is provided by KRS 396.140 as follows:

> **"396.140 [3877] Overpayment; recovery of.** When a personal representative pays * * * to a distributee * * * a part or all of his share of legacy, under a mistake as to the solvency of the estate or otherwise, he may recover from the * * * distributee * * * the amount of the overpayment, with interest."

Respondents pursued that statutory remedy in this suit which they commenced in Jefferson Circuit Court (A. "B", pp. 16a-45a), and which Petitioner removed to Federal Court upon the ground of diversity of citizenship (A. "B", pp. 2a-12a).

6. *Petitioner's Counterclaim, Amended Counterclaim and Second Amended Counterclaim.* Petitioner's original Counterclaim charged that Respondents, through "negligence, misconduct and disloyalty", caused her a loss of $822,035.04 difference between what she claims was the worth of Mr. O'Brien's partnership interest and the $380,000.00 for which she sold it (A. "B", pp. 134a-139a) in her Compromise Settle-

ment with the O'Brien Family. The District Court dismissed it upon the grounds that it was

(*a*) Barred by Kentucky's limitations statutes, KRS 413.120 as extended by 413.130, 413.160, and 413.090 (*Louisville Trust Co.* v. *Smith*, 192 F. Supp. at 399-401; A. "C", pp. 1609a-1614a); and

(*b*) Barred by the rule of *res judicata*, by the Judgment of May 23, 1940, in her above Rescission Suit (A. "C", pp. 1491a-1545a), which Respondents pleaded in their Amended Reply (A. "C", pp. 1384a-1390a; see *Louisville Trust Co.* v. *Smith*, 192 F. Supp. at 401-402).

Petitioner moved for leave to file her Amended Counterclaim (see A. "B", pp. 176a-224a) and her Second Amended Counterclaim (see A. "C", pp. 1706a-1746a) which, aside from asserting a multitude of evidentiary details, added nothing factually to her original Counterclaim or to avoid the defenses of limitation and *res judicata*. The District Court *denied* leave, upon the ground that while leave to amend should be "freely extended", nevertheless "when the amendment asserts no claim or defense" leave to amend should be withheld (*Louisville Trust Co.* v. *Smith*, 192 F. Supp. at 407; A. "C", pp. 1625a-1626a).

7. *The Summary Judgments.* The District Court entered its Summary Judgments finally dismissing Petitioner's original Counterclaim, and denying her leave to file her Amended and Second Amended Counterclaims; and in favor of Respondents for the amount

of the County Court's March 5, 1952, award of administration compensation, etc., less the credit, with interest (A. "C", pp. 2092a-2093a); and on her appeal, Sixth Circuit *affirmed*, except for disallowance of interest prior to the November 9, 1962, date of the Summary Judgments (*Louisville Trust Co.* v. *Smith*, 330 F. 2d at 489; A. "D", at pp. 2381a and 2368a).

WHY THE CAUSE SHOULD NOT BE REVIEWED.

First: The petition for certiorari totally fails "to present with accuracy, brevity and clearness" what is essential for an understanding of the points raised.

Her 215-page petition is cast with a chaotic review of the nearly twenty-eight years of Petitioner's numerous litigations over Mr. O'Brien's estate (some of which the District Court summarized in its Opinion, 192 F. Supp. at 398), in various state courts and in the federal courts, which has been characterized by her attempts at writs of prohibition and injunctions against state court judges and disqualification by affidavits of bias and otherwise of federal court judges (A. "C", p. 1608a), to such an extent that the Court of Appeals, in denying Petitioner's 114-page Petition for Rehearing (A. "D", pp. 2461a-2575a) in which she complained of deprivation of due process of law and equal protection of the laws, commented:

> "To the contrary, the record shows that appellant has presented her contentions in protracted litigation in various courts for more than a quarter

century, * * *. *Rare indeed is a litigant who has had more days in court than has appellant"* (A. "D", p. 2578a).[6]

For that violation of this Court's Rule 23-4, the petition should be denied.

Second: In view of the petition's total failure to comply with this Court's Rule 23-4, Respondents can only speculate as to what Petitioner actually means in her vague and conglomerate statements of what she claims are the questions for review (Petition, pp. 6-8) and the reasons upon which she relies for allowance of the writ (*Id.*, pp. 126-215).

I. Petitioner's assertion that the Court of Appeals decided an important question of Kentucky law in conflict with applicable Kentucky law (Petition, pp. 6-7) is totally devoid of merit.

She predicates her assertion upon her utterly erroneous claim that the District Court was in some way making or approving a "final settlement of the accounts of an estate." That is not so. The final settlement already had been made by the Jefferson County Court (probate court) by its March 5, 1952, Judgment and May 1, 1952, Amended Judgment (p. 4, *supra*), which the District Court correctly held created in the Respondents

> "a right to recover from the defendant an amount equal to the approved expenses and fees [which

[6]Petitioner's chaotic review includes vast material indiscriminately included in and lifted out of her 4-volume 2,625-page Appendix which accompanies her petition, which itself is filled with utterly irrelevant contentions in her "protracted litigation in various courts" to which the Court of Appeals referred.

that probate court had *already adjudged*] in excess of the moneys in the hands of the administrators" (192 F. Supp. at 399)—by this suit under KRS 396.140.

That County Court adjudication of the expenses and fees determined their amounts. KRS 396.140 (p. 5, *supra*) provided the remedy for enforcement of collection of their already adjudicated and determined amounts.

Respondents' suit did not seek, nor did the District Court undertake to adjudge, any approval or disapproval of the probate court's final settlement. On the contrary, the District Court referred to lack of a District Court's "jurisdiction over probate matters" (192 F. Supp. at 402; A. "C", p. 1616a), and then addressed itself to determination of whether the Respondents' settlement of their accounts in the probate court was a "final settlement" from which Petitioner's only remedy was by appeal within the 60-day period allowed by the Kentucky statutes (pp. 4-5, *supra*). The District Court determined that it was such a "final settlement", saying that

> "This Court is completely satisfied that the defendant took part in and participated in the settlement of the final account within the meaning of the Kentucky law. *Logan's Adm'rs* v. *Troutman's Ex'r*, 1820, 3 A. K. Marsh. 66, 10 Ky. 66; *Bell* v. *Henshaw's Ex'rs*, 1891, 91 Ky. 430, 15 S. W. 3; *Turley's Adm'r* v. *Barnes*, 1898, 103 Ky. 127, 44 S. W. 446; *Welch* v. *Lewis, et al.*, 1898, 104 Ky. 531, 47 S. W. 454. She cannot now be permitted to challenge this settlement in this action.

> Her remedy was by *appeal* to the Jefferson County Circuit Court, and thereafter, if she desired, to the Court of Appeals of Kentucky. It is *not* for this Court at this time to *review* the findings of the County Court of Jefferson County upon which the County Court based *its* final judgment approving the final settlement filed by the plaintiff administrators" (192 F. Supp. at 407).

The Court of Appeals, in affirming, also held that the probate court settlement was a "*final settlement*", and summarized the nineteen separate proceedings which Petitioner took in contesting and resisting and trying to prevent the settlement, which made it a "final settlement" (330 F. 2d at 488-489; A. "D", pp. 2378a-2380a). After an elaborate review of the Kentucky decisions, it concluded that despite Petitioner's failure to pursue "the conventional procedure in Kentucky" of filing technical or "formal" exceptions to a fiduciary's account "to contest the settlement", Petitioner so *participated* in the settlement proceedings that "her sole remedy was to appeal from the settlement in the state courts"—which she did not do—saying:

> "Upon the basis of the authorities hereinbefore cited [*Bell* v. *Henshaw's Ex'rs.*, 91 Ky. 430; *Turley's Adm'r.* v. *Barnes*, 103 Ky. 127; *Smith* v. *Shamburger, County Judge*, 314 Ky. 850], however, we construe the Kentucky rule to be that if the appellant participated in the settlement proceedings by contesting, resisting, objecting to or challenging the accounts, the settlement became *final* and binding upon her even in the absence of

> *formal* exceptions, and her *sole* remedy was to *appeal* from the settlement in the state courts. We agree with the District Court that appellant 'took part in and participated in the settlement of the final account within the meaning of Kentucky law,' and that '[s]he cannot *now* be permitted to challenge this settlement in this action' " (330 F. 2d at 488; A. "D", p. 2378a).

Indeed, the Court of Appeals referred to Petitioner's injunction suit against County Judge Shamburger (*Smith* v. *Shamburger*, 314 Ky. 850) in which she sought to enjoin him from proceeding to make "a *final* settlement" and said that in it

> "the Kentucky Court of Appeals explicitly pointed out that the County Court has *judicially determined* the accounting filed by the joint administrators to be 'a *final* settlement' * * * and that * * * appellant herein, 'can obtain adequate relief therefrom by an *appeal*' " (330 F. 2d at 488; A. "D", p. 2377a)—but she never appealed.

The Court of Appeals decision not only was *not* in any conflict with any applicable Kentucky law, but on the contrary precisely followed and applied the Kentucky law.

II. Petitioner's next assertion that the Court of Appeals violated Rule 15 of the Federal Rules of Civil Procedure, in not permitting her to file her Amended Answer and Amended Counterclaims (Petition, p. 7), is equally without merit.

First, by those amendments she simply sought to "re-litigate" claims against Respondents, which al-

ready had been adjudicated in the probate court "final settlement".

Second, her counterclaims, even if not previously foreclosed, had become barred by Kentucky limitations statutes (p. 6, *supra;* A. "B", pp. 146a-148a).

Third, her counterclaims, even if not barred by limitations, were barred under the rule of *res judicata,* by the Judgment of May 23, 1940, in her Rescission Suit (p. 6, *supra;* A. "C", pp. 1491a-1545a) which the Kentucky Court of Appeals affirmed against her (*O'Brien* v. *O'Brien,* 294 Ky. 793) and in which this Court denied *certiorari* (*O'Brien* v. *O'Brien,* 321 U. S. 767) and a rehearing (322 U. S. 769)—and as held by the District Court (192 F. Supp. at 401-402) and the Court of Appeals (330 F. 2d at 485-486).

Finally, while the District Court, in denying leave to file her amendments, recognized that Rule 15 requires that leave to amend be "freely extended", it correctly denied leave under the well established rule that the right not be extended "to a litigant when the amendment asserts no claim or defense" (192 F. Supp. at 407).

That rule is axiomatic (*Laughlin* v. *Garnett,* 138 F. 2d 931, C.A. D.C.; *Stephens* v. *Reed,* 121 F. 2d 696, C.C.A. 3; *Shall* v. *Henry,* 211 F. 2d 226, C.A. 7; *Overfield* v. *Pennroad Corp.,* 39 F. Supp. 482, D.C. Pa.; *American Securit Co.* v. *Shatterproof Glass Corp.,* 166 F. Supp. 813, D.C. Del., affirmed 268 F. 2d 769, C.A. 3, cert. den. 361 U. S. 902).

III. Petitioner's next assertion is that denial of leave to her to file her Amended Counterclaims sanc-

tions "a radical departure" from "accepted standards of judicial procedure" (Petition, pp. 7-8).

As said above, amendments which assert no valid claim or defense, and which, as said by the Third Circuit in *Stephens* v. *Reed*, 121 F. 2d 696, "would avail the offerer nothing if allowed", should *not* be allowed.

IV. Petitioner's final claim for the grant of review is that she has been denied due process of law under the Fourteenth Amendment, by denial of what she describes as "a trial on the issues involved in the action" (Petition, p. 8).

First, there was "no genuine issue as to any material fact", and the District Court's Summary Judgments so found (A. "C", p. 2092a).[7]

Rule 56 of Federal Rules of Civil Procedure, with reference to summary judgments, does not require any "trial" where there "is no genuine issue as to any material fact".

On the contrary, in such a case there is no constitutional right to trial by jury (*Lindsey* v. *Leavy*, 149 F. 2d 899, 902, C.C.A. 9; *In re Georgia Jewelers, Inc.*,

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[7]Every material fact was established by Petitioner's own admissions in her pleadings and properly authenticated records of judicial proceedings to which she was a party, *i.e.*:

(*a*) By Petitioner's admissions in her Answer and Counterclaim (A. "B", pp. 121a-139a) of the Complaint's allegations (A. "B", pp. 13a-45a), and its Exhibit 1 (A. "B", pp. 53a-93a) which was duly verified (A. "B", p. 93a, pp. 982a-983a) and authenticated by the Clerk's certificate (A. "B", pp. 1091a-1092a) to Petitioner's Exhibit No. 33 (A. "B", pp. 993a-1091a) to her Supplemental Affidavit (A. "B", pp. 472a-482a); and

(*b*) By Respondents' Exhibits Nos. 1, 2, 3, 4, 5 and 6 (A. "C", pp. 1391a-1545a) to their Amended Reply to Petitioner's original Counterclaim (A. "C", pp. 1383a-1390a)—which exhibits were duly authenticated by the Clerk's certificate (A. "C", pp. 1545a 1546a).

219 F. Supp. 386, 399, D.C. N.D. Ga.). The summary judgment procedure "does not infringe the constitutional right of a party to a trial by jury" (*Securities and Exchange Commission* v. *Payne*, 35 F. Supp. 873, 876, D.C. S.D. N.Y.; *cf. Fidelity and Deposit Co.* v. *U. S.*, 187 U. S. 315, 320).

Secondly, as said in the Court of Appeals' unpublished opinion (A. "D", pp. 2577a-2579a) denying Petitioner a rehearing, which she had sought upon the ground of deprivation of due process and equal protection, Petitioner

> "has presented her contentions in protracted litigation in various courts for more than a quarter century"

and

> "Rare indeed is a litigant who has had more days in court than has appellant. We find no violation of the Fourteenth Amendment" (A. "D", p. 578a).

CONCLUSION.

Petitioner has litigated, or had the opportunity to litigate, every contention she now makes "in protracted litigation in various courts for more than a quarter century" (A. "D", p. 2578a). She has been deprived of no rights. Means for starting all "over again" or continuing her contentions should not be provided.

The petition for certiorari should be denied.

9 February 1965.

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